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CASE NO. 82-815

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

In Re: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of the Bankruptcy Reform Act of 1978, 11 U.S.C. Section 362(b) (5), exempt from the automatic stay provision of 11 U.S.C. Section 362(a) state court proceedings which are intended to enforce a debtor's compliance with a mandatory injunction obtained in an action against the debtor to vindicate the state's police power authority to abate a public health hazard.

2. Whether a state court proceeding to enforce a mandatory injunction requiring the cleanup of a chemical waste storage facility and an order appointing a receiver to perform the cleanup which was necessitated due to the debtor's failure to comply with the injunction is a proceeding to enforce a money judgment or a proceeding to enforce an injunction within the meaning of 11 U.S.C. Section 362(b) (5).

3. Whether the State of Ohio is estopped to deny that the State is not seeking to enforce a money judgment.

PARTIES TO THE PROCEEDING BELOW

The petition to this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is sought by the State of Ohio on the relation of its Attorney General, William J. Brown. The State was a party to a proceeding before the Bankruptcy Court for the Southern District of Ohio which court issued a statutory stay against Ohio preventing it from going forward with a proceeding in a state trial court. The State was the appellant in the proceeding in the Sixth Circuit. William Lee Kovacs, d/b/a, B & W Enterprises, Hamilton Industrial Real Estate Company, Resort Rentals and Whitco Enterprises, (hereinafter "Kovacs" or "Debtor") is the debtor in the bankruptcy case, the moving party for the issuance of the statutory stay which is at issue in this case, and appellee in the Sixth Circuit proceeding. Jack Zettler is the receiver appointed in the state court proceeding which was stayed by the bankruptcy court and was a witness before the bankruptcy court. E. Hanlin Bavely is the bankruptcy trustee. Neither Bavely nor Zettler have filed any pleadings in appeals from the bankruptcy court's issuance of the stay although Zettler has orally indicated his concurrence with the State of Ohio's position.

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OPINIONS BELOW

The opinion of the Sixth Circuit in *State of Ohio v. Kovacs,* is reported at 681 F.2d 454 (6th Cir. 1982) and is set out for the Court's convenience in Appendix A. The decisions of the district court and bankruptcy court are not reported, but are set forth in Appendices C and D.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1982. The State of Ohio, however, filed a timely petition for rehearing and suggestion for *en banc* consideration. The motion was denied on August 16, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an interpretation of the statutory stay provisions of the Bankruptcy Reform Act of 1978, 11 U.S.C. Section 362, and the determination of the extent to which a suit brought by the State of Ohio in state court in the exercise of the State's police power is exempted from the application of the stay. The relevant provisions of the Bankruptcy Act of 1978 are set forth in Appendix H.

STATEMENT OF THE CASE

On September 29, 1976, the State of Ohio, on the relation of its Attorney General, Director of Environmental Protection, and Department of Natural Resources, filed suit in the Butler County, Ohio, Court of Common Pleas, Case No. CV76-09-0834, against, among others, the Chem-Dyne Corporation and William Lee Kovacs, individually and as an officer of Chem-Dyne, alleging, *inter alia,* that defendants had caused the unlawful discharge of toxic water pollutants, i.e., the pesticides Endrin, Dieldrin and Heptachlor into the waters of the state in violation of Chapter 6111 of the Ohio Revised Code; that the defendants had caused an air pollution nuisance in violation of Chapter 3767 of the Ohio Revised Code; and that the defendants' illegal water pollution had caused the death of numerous wild animals, including fish. The Chem-Dyne Corporation was an industrial and chemical waste treatment, recycle, storage and disposal company located at 500 Ford Boulevard in the middle of the City of Hamilton, Butler County, Ohio. William Lee Kovacs was one of the two principal corporate officers of the company and was named as a defendant both as an officer of the corporation and individually because the State contended that many of the unlawful acts were committed at his direction and in his presence.

On July 18, 1979, after more than two (2) years of negotiation, a Stipulation and Judgment Entry was entered in the case. (The Stipulation and Judgment Entry is included as Appendix G.) Kovacs personally signed the Stipulation and Judgment Entry. In that Stipulation and Judgment Entry, the State of Ohio alleged that the defendants had caused water pollution, nuisance conditions and fish kills in violation of Chapters 6111, 3767 and 1531 of the Ohio Revised Code. Finding No. 1 of the Stipulation established that defendants were in the business of hauling, recycling and redistributing

hazardous industrial waste. The Stipulation and Judgment Entry contained a Finding No. 7 that the defendants had industrial wastes and other types of wastes stored on their premises at 500 Ford Boulevard, Hamilton, Ohio, in the amount of 850,000 gallons in liquid form and 4,000 barrels of solid or semi-solid sludges. In Orders 1 and 2 of the Judgment Entry defendants were enjoined to abate water pollution and nuisance conditions at 500 Ford Boulevard. In Order No. 3 the defendants were ordered to remove all the industrial and other wastes described in Finding No. 7 from the premises at Ford Boulevard within 12 months. In Order No. 8, the defendants were directed to pay $75,000 to the Ohio Department of Natural Resources as compensation for the alleged fish kills.*

On February 1, 1980, in a written opinion, Judge Robert L. Marrs, Butler County Court of Common Pleas, granted the State's motion to have a receivership imposed over the defendants. (The Court's decision is included as Appendix F.) In granting the State's motion the court specifically found that the defendants had failed to remove the industrial and hazardous wastes stored in Hamilton as required by Order No. 3 of the Stipulation and Judgment Entry. The court specifically noted that the defendants had operated in "flagrant disregard of the Stipulation and Judgment Decree." (App. F at 41):

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*That part of the order imposing a $75,000 money judgment to Ohio DNR is not at issue in this appeal. The State recognizes this as a money judgment which is dischargeable in bankruptcy. DNR has therefore filed its proof of claim and is using the remedies provided in the Bankruptcy Code to satisfy its money judgment. This appeal deals strictly with the bankruptcy court's determination concerning the effect of the automatic stay contained in 11 U.S.C. Section 362 on Ohio's ability to enforce the injunctions contained in Orders 1, 2, and 3 of the July 18, 1979, Stipulation and Judgment Entry.

> Defendants in this case are engaged in a business that definitely affects this entire community and conceivably the water for this entire area as well as the wild life, natural resources of the area, and the fish in the streams. Mr. Kovacs is engaged in businesses that very definitely have a wide spread effect on the community life and its daily operation and is affected with a public interest which invokes the equity powers of the Court.
> (App. F at 42).

On February 4, 1980, the court entered an order appointing Jack Zettler as receiver and directing the defendants, including Kovacs, to turn over their assets to the receiver for use by the receiver in fulfilling the cleanup obligations imposed upon the defendant in the July 18, 1979 Stipulation and Judgment Entry. (The Order appointing Receiver is included as Appendix E.) *The order also contained an injunction imposing upon Kovacs a continuing duty to cooperate with the receiver to complete the removal of wastes.*

On July 17, 1980, Kovacs filed a petition for reorganization pursuant to Chapter XI of the Bankruptcy Code, 11 U.S.C. Section 101, *et seq.*, and sought an automatic stay pursuant to 11 U.S.C. Section 362 against the state court receiver, Mr. Zettler. On July 28, 1980, the bankruptcy court dissolved the stay against the receiver because the state receivership was determined to be exempt from the stay pursuant to 11 U.S.C. Section 362(b) (4). Subsequently Kovacs converted to straight bankruptcy pursuant to Chapter VII.

On September 12, 1980, the State moved the Butler County Court of Common Pleas to hold a hearing to determine whether Debtor Kovacs had additional assets which, pursuant to the court's order of February 4, 1980,

should be administered by the receiver and used to complete the cleanup. Specifically, the State alleged that while the cleanup under the receiver's direction was ongoing, there was a need for additional assets to complete the removal and lawful disposal of the waste materials which remained on-site. Since Kovacs had obtained employment elsewhere after the appointment of the receiver, the State asked for the hearing before the common pleas court judge to determine if Kovacs, pursuant to the injunction establishing his continuing duty to cooperate with the receiver, should be required to provide additional financial assistance to complete the removal of wastes from the site.

On September 19, 1980, Debtor Kovacs filed in the bankruptcy court a Motion for a Specific Stay seeking a determination that the statutory stay contained in 11 U.S.C. Section 362 applied against the hearing in the Butler County Court of Common Pleas requested by Ohio on September 12. A hearing on the motion was held before the Bankruptcy Court on September 29, 1980. At the hearing the State presented the expert testimony of Frank Byros of U.S. EPA and Ken Harsh of Ohio EPA. Byros testified concerning the various environmental hazards he encountered at the Ford Boulevard site: (1) fire hazards from flammable chemicals; (2) odors and irritated throats from the air pollution caused by vapors from the chemicals on-site; and (3) ground and surface water pollution caused by the leaking barrels and open pits of toxic chemicals. He testified that the site was an imminent hazard and that the problems would be aggravated by any delay in the cleanup. Harsh also testified concerning the types of dangerous chemicals stored on the site and expressed his opinion that any delay in the cleanup would aggravate the problem. Mr. Zettler, the receiver, testified concerning the need for additional funds in the receivership without which the cleanup would be delayed thereby confirming the fears of Byros and Harsh. Zettler also explained how those funds would be used in the cleanup.

A temporary stay was issued on October 1, 1980, which was to remain in effect until the judge decided the motion for a stay. On October 31, 1980, the bankruptcy court entered its decision and order holding 11 U.S.C. Section 362 applicable and thereby granting Debtor's motion and making permanent the stay contained in 11 U.S.C. Section 362. (The decision is contained in Appendix D). Specifically, the bankruptcy court held that while the State's mandatory injunction was clearly injunctive relief, not a money judgment, since there was no difference in effect upon Kovacs between the expenditure of funds pursuant to a mandatory injunction and a money judgment, Ohio was "estopped to deny" that it was not seeking a money judgment. (App. D at 21). Upon appeal by the State, the decision was affirmed in the United States District Court for the Southern District of Ohio (Appendix C) and by the Sixth Circuit. It is from the Sixth Circuit's decision that the State of Ohio brings its petition to this Court for a writ of certiorari to the Court of Appeals.

REASONS FOR GRANTING THE PETITION

This case presents a question of profound importance to the federal, state and local governments which are attempting to protect citizens from the dangers presented to their health and safety by illegally operated chemical waste disposal facilities. More specifically, this case presents a classic confrontation between the rights of an allegedly impecunious operator of a chemical waste storage facility, William Lee Kovacs, who seeks the shelter of the Bankruptcy Reform Act of 1978 to protect him from his obligation to clean up the environmental nightmare he created, and the rights of the State of Ohio to enforce an injunction obtained against Kovacs prior to his bankruptcy petition which injunction required Kovacs to abate water pollution and nuisance conditions and to

remove all chemical and industrial wastes from the premises before they caused serious harm to the public health and safety. The decisions of the bankruptcy court, district court and court of appeals below focus solely on the effect of Ohio's enforcement efforts on Debtor Kovacs and demonstrate no concern for the threat to public health and safety which is presented by the hazardous materials stored on the Chem-Dyne site. Contrary to the decision below, the legislative history of the Bankruptcy Reform Act of 1978 and the decisions of other federal courts recognize that the rights of a debtor must be carefully balanced against the public health and safety and that in the event of a conflict, public health and safety must prevail. Thus, Ohio seeks to have this Court reverse the decision of the court of appeals which gives priority to a debtor's financial interest over the health and safety of the public. The State presents three grounds in support of its petition for certiorari.

I. The Decision Below Involves An Important Question Of Federal Law, Whether A Bankruptcy Court, To Protect Debtors, May Prevent A State From Exercising Its Police Power To Pursue Enforcement Of An Injunction To Abate A Public Health Hazard.

Throughout the development of federal bankruptcy law there has been a constant tension between the administration of federal bankruptcy proceedings and the enforcement of the states' police power. There has been a temptation for debtors to attempt to use the shelter of the bankruptcy courts to avoid fulfilling their responsibilities under regulatory programs enacted pursuant to state police power. As early as 1939, however, this Court

admonished in, *Palmer v. Commonwealth of Massachusetts,* 308 U.S. 79 (1939), that a bankruptcy proceeding cannot be used to excuse noncompliance with state regulatory programs or to displace the policy judgments of state administrative agencies. Similarly, in *Callaway v. Benton,* 336 U.S. 132, 141 (1949), this Court declared that:

> We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded.

Indeed, the problem is so serious that it was specifically addressed by Congress in the Bankruptcy Reform Act of 1978. Congress was concerned that bankruptcy courts not use their authority to disrupt the enforcement of statutes adopted pursuant to the states' police power to protect public health and safety. This concern was particularly evident in the Congressional committee reports which discussed the automatic stay provisions ultimately contained in 11 U.S.C. Section 362:

> Under present law, there has been some overuse of the stay in the areas of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. In a Montana case, the stay was applied to prevent Nevada from obtaining an injunction against a principal in a corporation who was acting in violation of Nevada's anti-fraud consumer protection laws. The bill excepts these kinds of actions from the automatic stay. The

> States will be able to enforce their police and regulatory powers free from the automatic stay. The bankruptcy court has ample additional power to prevent damage to the bankrupt estate by such actions on a case-by-case basis. By exempting these state actions from the scope of the automatic stay, *the court will be required to examine the state actions more carefully, and with a view to protecting the legitimate interests of the state as well as of the estate,* before it may enjoin actions against the debtor or the estate. *House Report No. 95-595,* 95th Cong., 1st Sess. (1977), accompanying H.R. 8200, at p. 155-156 (emphasis supplied).

Similar language is contained in the Senate Report on the Senate version of the Bankruptcy Act of 1978, S. 2266. *See Senate Report No. 95-989,* 95th Cong., 2nd Sess. (1978), at p. 52. Indeed, both reports emphasize that state police power enforcement actions are not subject to the automatic stay, but if it is necessary, they may be enjoined pursuant to 11 U.S.C. Section 105 where the court may develop a more flexible form of injunction *which protects the states' legitimate police power interests as well as the interest of the parties to the bankruptcy case. House Report No. 95-595* at p. 342; *Senate Report No. 95-989* at p. 51. Thus, the theme repeated thoughout the legislative history of the Bankruptcy Reform Act of 1978 is that when dealing with a state police power enforcement action a bankruptcy court must avoid using a heavy-handed approach and meticulously balance the states' interest in the enforcement of their laws with the interests of the bankruptcy estate.

This Congressional policy was adopted in the language of 11 U.S.C. Section 362 which reflects the Congressional determination that the automatic stay be defined by statute and not left to case-by-case judicial determination. Section 362 states in relevant part as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title operates as a stay, applicable to all entities, of – –
>
> * * *
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> * * *
>
> (b) The filing of a petition under section 301, 302 or 303 of this title does not operate as a stay – –
>
> * * *
>
> (5) under subsection (a) (2) of this section of the *enforcement of a judgment, other than a money judgment,* obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police power or regulatory power; (emphasis supplied).

The distinction created in Section 362(b) (5) is explained in *House Report No. 95-595* as follows:

> Paragraph (5) makes clear that the exception extends *to permit an injunction and enforcement of an injunction,* and to permit the entry of a money judgment, but does not permit enforcement of a money judgment. *Id.* at 343. (emphasis supplied.)

The same language appears in *Senate Report No. 95-989* at p. 52. Thus, the Congressional committee reports clearly indicate that the enforcement of an injunction obtained by a governmental unit in an action to enforce its police or regulatory powers is exempt from the automatic stay in Section 362 while an attempt to enforce a money judgment is subject to the stay.

In light of the thoughtful consideration given to this matter by Congress and the explicit statutory language adopted it would seem that the distinction drawn between injunctions and money judgments for purposes of determining the applicability of the statutory stay would settle the matter. Unfortunately this has not been the case. Instead there has continued to be a splintering of authority throughout the district courts and courts of appeals as to when the statutory stay is applicable against state police power actions. Compare: *In re Hillsdale Foundry Company,* 2 C. B. C. 542 (Bkrtcy. W.D. Mich. 1974) (state action to shut down factory in violation of pollution laws is subject to bankruptcy stay) with *In re Canarico Quarries, Inc.,* 466 F. Supp. 1333 (D.P.R. 1979) (stay inapplicable to state action to shut down factory in violation of pollution laws); Compare: *In re Jacobsmeyer,* 13 B.R. 298 (Bkrtcy. W.D. Mo. 1981) (stay applicable against injunction obtained by state in exercise of its police power which would preclude a viable reorganization plan) with *Donovan v. TMC Industries, LTD,* 20 B.R. 997, 1004 (N.D. Ga. 1982) (stay does not apply against injunction obtained by federal government in

exercise of its police power which would preclude a viable reorganization plan); Compare: *In re Theobald Industries, Inc.*, 16 B.R. 537, 539 (Bkrtcy. D. N.J. 1981) (statutory stay applies against National Labor Relations Board proceeding) with *National Labor Relations Board v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981) (statutory stay does not apply against NLRB proceedings); Compare: *In re Mason*, 18 B.R. 817 (Bkrtcy. W.D. Tenn. 1982) (statutory stay applies to prevent state from revoking debtors' liquor license) with *Colonial Tavern, Inc. v. Byrne*, 420 F. Supp. 44 (D. Mass. 1976) (stay not applicable to prevent revocation of liquor license); Compare: the Sixth Circuit's decision in this case imposing the stay against an injunction and order appointing a receiver in a state police power enforcement action with *Securities and Exchange Commission v. First Financial Group of Texas*, 645 F.2d 429, 436-439 (5th Cir. 1981), in which the Fifth Circuit held that the stay does not apply against an injunction and order appointing a receiver in a federal police power enforcement action. As a comparison of these cases reveals, the manner in which the language of the statutory stay has been interpreted has led to increased uncertainty rather than clarity in implementing the policy which Congress intended. While some of the cases suggest that the key to reconciling the divergent holdings is whether a state's interest in a case is a pecuniary one or one that directly involves public safety considerations, *Donovan, supra*, at 1001, a clear, definitive statement from this Court would be extremely valuable. As such, the time is ripe for this Court to confront this issue which Congress found important enough to specifically address in the Bankruptcy Reform Act's legislative history.

The case at bar presents an appropriate vehicle for this Court to delineate the extent to which state police power enforcement activities are subject to the Bank-

ruptcy Reform Act's statutory stay. At the hearing before the bankruptcy court the State of Ohio presented two expert witnesses, one from U.S. EPA and one from Ohio EPA, who testified concerning the serious extent of the environmental peril presented by the Chem-Dyne site: fire hazards, leaking drums and tanks of toxic chemical wastes which could cause grave water pollution problems, and chemical vapors which burned and irritated the throats of persons who breathe them. Those experts also added that the situation would grow worse the longer the materials remained on-site. In addition, the state court receiver, Jack Zettler, testified that there was no source of immediate funds other than Kovacs to perform many of the abatement projects which required immediate attention. By contrast, Kovacs offered no evidence before the bankruptcy court. Despite the fact that Ohio presented extensive evidence of an immediate threat to public health and safety, and despite the fact that Ohio produced evidence to demonstrate the need to invoke the February 4, 1980 injunction issued to Kovacs to cooperate with the receiver to accomplish the cleanup ordered by the injunction contained in the July 18, 1979 Stipulation and Judgment Entry, all the courts below focused solely on the impact upon Kovacs' financial future and held that the statutory stay automatically applied. Thus, this case presents this Court with a situation where the State has made a clear showing of the immediate need to enforce injunctions against Kovacs to abate an imminent public health hazard. Yet the court of appeals held that due to the adverse impact upon Debtor Kovacs' pecuniary interests, the statutory stay automatically applies to prevent Ohio's enforcement efforts from going forward.* A sharp factual context concerning the proper interpretation of the automatic statutory stay provision could not, therefore, be more clearly placed before the Court.

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*It is important to understand that all three courts below based their decision upon the automatic, rigid invocation of the statutory stay pursuant to 11 U.S.C. Section 362 and that none of the courts addressed the development of a more flexible remedy pursuant to 11 U.S.C. Section 105.

In addition to the specific facts of this case, the general subject matter of environmental regulation presents a significant context for the Court to address the relationship between the debtor protection concerns of bankruptcy and the state police power concern with protecting public health and welfare. Within the area of environmental law there are numerous ways in which the goals of environmental protection and debtor protection collide. There are two, however, which are critically affected by the Sixth Circuit's decision below, hazardous waste disposal and strip mine reclamation. In both of these areas there has been a repeated pattern of fly-by-night companies which operate illegally, make a quick buck and then leave behind an unabated environmental nightmare, either huge amounts of toxic and chemical wastes which threaten public health or land ravished until it looks like a moonscape. The correction of either situation requires large sums of money. Thus, Congress and the states have been very active in creating new regulatory programs to deal with those situations. *See* Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1201, *et seq.;* Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, *et seq.;* Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601, *et seq.* The decision below, however, if left untouched, allows violators to defy regulatory efforts. The Sixth Circuit's decision allows unscrupulous operators to create an environmental disaster and then cloak themselves with the protection of the bankruptcy court to prevent states from requiring them to abate the hazards which they created. Furthermore, the pattern of such conduct seems to be on the increase as regulatory programs are strengthened.*

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*Indeed in Ohio alone there are several other situations where parties responsible for chemical waste sites or strip mine areas have sought the protection of bankruptcy courts against Ohio's enforcement efforts.

Thus, while Congress considered the relationship between bankruptcy and state police power enforcement activities to be serious enough to warrant Congress to specifically address the matter in the Bankruptcy Reform Act, Congress' efforts have not successfully clarified the matter and there exists a serious divergence of authority within the lower federal courts as to the proper manner in which the automatic stay should be applied to state police power activities. The instant case presents a clear and direct vehicle for addressing this important issue. Therefore, certiorari should be granted.

II. The Decision Below Creates A Conflict Between The Circuits Concerning The Applicability Of The Automatic Statutory Stay To The Enforcement Of Injunctions Obtained By States In The Exercise Of Their Police Power To Protect Public Health And Safety.

As indicated above, there has been a great deal of conflict among the lower federal courts concerning the manner in which the Bankruptcy Code's automatic statutory stay is to be applied in actions to enforce state police power authority. The Sixth Circuit's decision in this case is a classic example of this lack of uniformity because the decision below directly conflicts with the decision of the Fifth Circuit in *Securities and Exchange Commission v. First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981). In addition, the interpretation of the phrase "money judgment" contained in the decision below directly conflicts with what had previously been a uniform definition of that phrase within the federal courts. *See United States Fidelity and Guaranty Co. v. Ft. Misery Highway Dist.,* 22 F.2d 369, 372-373 (9th Cir. 1927); *Fuller v. Aylesworth,* 75 F. 694, 701 (6th Cir. 1896). Each of these conflicts will be examined below.

In *SEC v. First Financial Group of Texas, supra,* the Fifth Circuit was faced with a civil enforcement action brought by the SEC against First Financial for various securities violations. The SEC sought and obtained injunctive relief. Meanwhile, a petition for involuntary bankruptcy had been filed against First Financial. Five days *after* the filing of the bankruptcy petition, the district court in the SEC's enforcement action granted the SEC's motion to appoint a receiver to implement the injunction and assure that there would be no additional

unlawful fraudulent transactions. The receiver was directed to take exclusive control of the corporation's assets. *Id.* at 436-437. First Financial challenged the district court's appointment of the receiver on the grounds that the automatic statutory stay prevented the district court from going forward in the enforcement action to appoint the receiver to implement the previously issued injunction. The Fifth Circuit rejected the claim and stated:

> A continuing civil enforcement proceeding brought by a governmental unit and the enforcement of injunctive relief obtained therein are exempted from the automatic stay provisions of Section 362(a). *Id.* at 437 (emphasis original).

The court noted that the use of receiverships was a well-established mechanism for implementing injunctive relief and that the receivership at issue would "assure complete enforcement of the federal securities' laws." *Id.* at 438. The Fifth Circuit then concluded that the legislative history clearly indicated that Congress did not intend for the automatic stay to apply in such a situation. *Id.* at 439.

The factual pattern in *First Financial* is virtually identical to the case at bar. In both cases a governmental unit pursuant to its police power had obtained injunctive relief to abate violations of law. In both *First Financial* and in the instant case a receiver was appointed to implement the injunction. In both cases the receiver was granted exclusive possession of the debtors' assets. Yet in *First Financial* the Fifth Circuit recognized that the automatic stay did not prevent the implementation of the injunctive relief while the Sixth Circuit below held that the automatic stay prevented Ohio from implementing the injunction.

The conflict between the two decisions is made more blatant when they are considered in light of the fact that the receivership in *First Financial* presented a greater imposition to the bankruptcy estate than in the case at bar. In *First Financial* the receiver maintained exclusive possession of the bankruptcy estate. *Id.* at 439. By contrast, in a separate proceeding in the case at bar the receiver had turned over the assets of the estate to the bankruptcy trustee, and the action of Ohio below was directed not at the bankruptcy estate but at Kovacs' post-petition income which was easonable in light of the assumption made by all the courts below that Kovacs' obligation to perform the injunctions was non-dischargeable.* Furthermore, while the SEC's enforcement effort in *First Financial* was intended to protect the financial investments of the public, a true pecuniary interest, Ohio's efforts have been aimed at safely removing toxic chemical wastes from the middle of a city thereby abating what an expert from U.S. EPA described as an "imminent hazard." Yet the Fifth Circuit held that Congress afforded the SEC the room to protect the pecuniary interests of the investing public while the Sixth Circuit interpreted Section 362 as precluding Ohio from protecting the lives of the citizens of Hamilton. Such contradictory application of the statutory stay to a matter of such grave concern to public health and safety mandates this Court's attention.

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*In a recent development the district court, citing the Sixth Circuit's decision which is at issue here as "law of the case" affirmed the bankruptcy court's determination that Kovacs' duty to perform the injunction was dischargeable. *See State of Ohio, ex rel. Brown v. Kovacs,* Case No. C-1-82-526 (S.D. Ohio, September 17, 1982). Thus, a decision of the Sixth Circuit made on the assumption of *nondischargeability* has been cited as law of the case requiring a determination of *dischargeability.* While this makes no logical sense, it is an example of the "double speak" which Ohio has constantly faced in its efforts to vindicate its right to protect the health and safety of the citizens of Hamilton, Ohio.

Unfortunately, the conflict between *First Financial* and the case at bar is not the only inconsistency between the holding in this case and previous federal appellate decisions. As previously mentioned, for purposes of determining the applicability of the automatic stay, Congress distinguished, in Section 362(b) (5), between injunctions and money judgments with the stay only being applicable to the latter. The term "money judgment" is a specific term of art. Indeed, as elementary a legal authority as *Black's Law Dictionary* (4th Ed. 1968) defines the term "money judgment" as follows:

> One which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred. *Id.* at p. 980.

The authority cited by *Black's* are decisions of the Sixth and Ninth Circuits in *Fuller v. Aylesworth, supra,* and *United States Fidelity and Guaranty Co. v. Ft. Misery Highway Dist., supra.* In both cases the courts of appeals concluded that a money judgment was an order to pay a sum certain rather than an order to perform an act which, of course, is an injunction. Thus, in reliance upon the uniform holding within the federal courts concerning the definition of money judgment, Congress was able to create an ostensibly clear distinction between money judgments and injunctions. The decision below obliterates this distinction.

The Sixth Circuit's decision adopts the reasoning of the bankruptcy and district courts which recognized that Ohio was enforcing an injunction, not a money judgment. The three courts below, however, reasoned that since Ohio sought to compel Kovacs to spend money to accomplish the acts mandated by the injunction, the injunction was "in essence" a money judgment. 681

F.2d at 456. Effectively, this destroys the distinction which had previously been uniformly accepted within the federal courts between an order to pay a sum certain and an order to perform an act. Even more importantly, the Sixth Circuit's decision conflicts with a group of uniform federal decisions upon which Congress itself relied to create a meaningful distinction between situations in which the automatic stay is and is not applicable. Thus, the court of appeals' decision below rejecting the distinction between money judgments and injunctions previously recognized in *Fuller, supra,* and *Ft. Misery, supra,* creates further confusion in an already confused area and negates Congress' efforts to clarify the matter. Therefore, the situation requires this Court's attention.

The decision below starkly portrays what is happening with the federal courts' conflicting interpretations of what was intended by Congress to be a clear declaration that state police power enforcement actions for injunctive relief are not subject to the automatic statutory stay. Due to the conflicts created by the oblique reasoning of the court below, the confusion in this area will continue to grow if the Sixth Circuit's decision is allowed to stand. Thus, this Court should accept Ohio's petition and grant the writ which the State seeks.

III. The Decision Below Represents A Serious Failure Of The Sixth Circuit, District And Bankruptcy Courts To Honor A Policy Choice Made By Congress Which This Court, In View Of Its Supervisory Power Over Bankruptcy Courts, Should Not Ignore.

In *Maggio v. Zeitz,* 333 U.S. 56, 59 (1948), this Court was faced with a decision of a bankruptcy court ordering the imprisonment of a debtor for an act which the lower court admitted it knew was impossible for the debtor to perform. This Court noted that the internal contradiction in the order imprisoning a person for the failure to perform an act which was admittedly impossible to perform justified the exercise of the Court's supervisory authority over bankruptcy courts. *Id* at 59. A similar internal contradiction in the decisions below in the case at bar justifies the exercise in this case of the Court's supervisory authority over bankruptcy courts.

The Court of Appeals stated below that:

> We concur with the bankruptcy court's conclusion that Section 362 indicates a clear intent to permit governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition but to deny those units the power to collect money in their enforcement efforts. *Id.* at 456.

After acknowledging the right of states to enforce mandatory injunctions, however, the court then held that the State cannot compel Kovacs to spend money to perform the acts required by the mandatory injunction issued by

the common pleas court, in effect negating the very activity which the Sixth Circuit acknowledged that Congress intended. This internal contradiction requires this Court to address the lower courts' refusal to honor Congress' policy choice concerning the applicability of the statutory stay.

As all the courts below acknowledge, in Section 362(b) (5), Congress intended to distinguish between money judgments and injunctions for purposes of determining the applicability of the automatic statutory stay, with injunctions being exempt from the automatic statutory stay. In *House Report No.* 95-595, *supra,* at p. 174, Congress expressed its dissatisfaction with the manner in which the automatic stay was being administered under the old statute and the Rules of Bankruptcy Procedure. Specifically, the House Committee expressed displeasure with the harm which could accrue to the public as a result of operation of an automatic stay against police power enforcement actions. Thus, the conditions for the operation of the automatic stay were to be expressly defined by statute.

Elsewhere in both the House and Senate reports Congress expressed its intent that actions which are exempt from the automatic stay should be handled in adversary complaints for injunctive relief subject to the traditional equitable principles which apply to requests for injunctive relief. Specifically, both reports declare as follows:

> The court has ample other power to stay actions not covered by the automatic stay. Section 195, of proposed title 11, derived from Bankruptcy Act Section 2a (15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The bankruptcy

> courts are brought within the scope of the All Writs Statute, 28 U.S.C. 1651 (1970), and are given the powers of a court of law, equity, and admiralty (H.R. 8200, Section 243(a), proposed 28 U.S.C. 1481). Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed. *House Report No. 95-595,* p. 342; *Senate Report No. 95-989,* p. 51.

Indeed, the House report explicitly stated that police power actions are not subject to the automatic stay and should be enjoined only on a case-by-case basis and upon such terms as will still protect the state's legitimate police power interests:

> The States will be able to enforce their police and regulatory powers free from the automatic stay. The bankruptcy court has ample additional power to prevent damage to the bankrupt estate by such

> actions on a case-by-case basis. By exempting these State actions from the scope of the automatic stay, the court will be required to examine the State actions more carefully, and with a view to protecting the legitimate interests of the State as well as of the estate, before it may enjoin actions against the debtor or the estate. *House Rep. No. 95-595,* at p. 156.

In contrast to this clear directive to carefully protect legitimate state police power interests, the courts below mechanically issued a stay against Ohio despite the fact that, as the courts themselves admit, the judgment Ohio wishes to enforce is not a money judgment to which the stay applies. The lower courts' heavy-handed extension of the stay to enjoin the Ohio receivership proceeding is thus contrary to the express language of the statute and the explicitly stated intent of Congress to balance the public interest in public health and safety against the interests of the bankruptcy estate, a balancing test which none of the courts below performed. The total failure of any of the three courts below to give any consideration to the interests of Ohio is very distressing, and is particularly irresponsible in light of the peril posed to the citizens of Hamilton by the toxic chemical wastes on the Chem-Dyne site.

Congress clearly stated that the automatic stay was to be defined by statute and could not be arbitrarily expanded without considering the public interest at stake in Ohio's action. Yet the courts below justified their rigid failure to implement the will of Congress by invoking estoppel and claiming that Ohio was "estopped to deny" that it was enforcing a money judgment. 681 F.2d at 456. The error in this contrived device for thwarting the will of Congress is clear.

It has repeatedly been held that when determining whether estoppel applies, a federal court must look to state law of estoppel. *Wilkie v. Brooks,* 515 F.2d 741, 748 (6th Cir. 1975), *cert. denied,* 423 U.S. 996 (1975). Accord: *Gladden v. Pargas, Inc. of Waldorf, Md.,* 575 F.2d 1091 (4th Cir. 1978); *Minne. Farm Bureau Marketing Corp. v. North Dakota Agr. Marketing Ass'n., Inc.,* 563 F.2d 906 (8th Cir. 1977); *United States v. Briggs Manufacturing Co.,* 460 F.2d 1195 (9th Cir. 1972); *Glenn v. State Farm Mutual Insur. Co.,* 341 F.2d 5 (2d Cir. 1965). Ohio law requires six essential elements to justify the invocation of estoppel:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with those which the party subsequently attempts to assert; (2) intention, or at least expectations, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, the essentials generally are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. 20 Ohio Jurisprudence 2d, *Estoppel and Waiver,* Section 35 (1956), p. 499. Accord: *Murec v. United States Steel Corp.,* 195 F. Supp. 137 (N.D. Ohio, 1961).

The elements which are required to justify the imposition of estoppel under Ohio law are virtually identical to those which are required in the vast majority of jurisdictions throughout the country. See 28 American Jurisprudence 2d, *Estoppel and Waiver,* Section 35 (1966), p. 640-642; 31 Corpus Juris Secundum, *Estoppel,* Section 67 (1964), p. 402-403.

Thus, since the six critical elements of estoppel are nearly universally recognized, the following question must be asked: Where in the record is there even a scintilla of evidence establishing any of the necessary elements of estoppel? The silence of all three decisions below on this question is deafening. None of the opinions addresses any of the elements of estoppel or cites any evidence supporting each element. What false representation did Ohio make? What act of the State did Kovacs rely upon to his detriment? Where is any evidence that the State intended to mislead Mr. Kovacs? Where is there any evidence that Mr. Kovacs had less knowledge than the State about any fact upon which he relied to his detriment? The answer to these questions is that such evidence exists nowhere in the record. Indeed, Debtor Kovacs presented no evidence at all in the hearing before the bankruptcy court. Instead, he rested upon his alleged right to a stay under the language of Section 362.

Thus, the nature of the unique estoppel doctrine developed by the courts below in the case at bar becomes clear. They do not use the term "estoppel" in a lawful manner referring to willful misrepresentation and detrimental reliance. Rather, the essence of their use of the term "estoppel" is as follows: "Ohio, you are technically correct. The statutory stay does not apply to you. But we do not like the result of applying the statute in the manner adopted by Congress. Therefore, we will 'estop' you from exercising your rights under the

bankruptcy law as Congress enacted it." This is not estoppel in a lawful and legal sense. It is a refusal of courts to honor the policy declared by Congress because in a specific case the courts disagree with the outcome mandated by the policy Congress adopted. It is also reversible error.

In conclusion, Congress clearly indicated that the enforcement of injunctions obtained by units of government in the exercise of their police power are not subject to the automatic statutory stay of the Bankruptcy Reform Act of 1978. Congress stated that a bankruptcy court may only interfere with such enforcement efforts after a very careful, meticulous balancing of the public interest and the interests of the bankruptcy estate and then only by crafting an injunctive remedy which carefully protects public health and safety. The Sixth Circuit's decision below, however, authorizes a heavy-handed, insensitive, blanket stay against the enforcement of the injunction which Ohio obtained against Kovacs requiring him to remove the toxic chemicals which threatened the health and safety of the citizens of Hamilton. The Sixth Circuit's attempt to justify this defiance of Congressional policy is based upon an unlawful use of the doctrine of estoppel. This attempt by a court to impose its policy judgment rather than that of Congress requires this Court to exercise its supervisory authority over bankruptcy courts. As Chief Justice Burger recently stated:

> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt Congressional action by judicially decreeing what accords with "common sense and public weal." Our constitution vests such responsibilities in the political branches. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978).

CONCLUSION

The case at bar presents a situation which exemplifies a matter of vital concern to state governments across the country involving the conflict between the ability of states to protect public health and safety and the rights of persons seeking the shelter of bankruptcy. In addition, this case also presents a direct conflict between decisions of the Fifth and Sixth Circuits concerning the extent to which governmental attempts to enforce injunctions are exempt from the automatic statutory stay created by the Bankruptcy Reform Act of 1978. Furthermore, the refusal of the court below to honor Congress' policy choice concerning the exemption of injunction actions from the scope of the statutory stay calls for the exercise of this Court's supervisory authority. Therefore, the State of Ohio respectfully submits that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this 12th day of November, 1982 to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011; to William H. Eder, 900 Tri-State Building, Cincinnati, Ohio 45202; to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

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